

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CoxCom, Inc. d/b/a)	CSR-6252-A
Cox Communications Orange County)	CSR-6200-M
)	CSR-6242-M
Petition for Reconsideration)	
)	
KVMD Licensee Co., LLC)	CSR-6984-M
v.)	
Cox Communications, Inc.)	
)	
Petition for Reconsideration)	
)	
KVMD Licensee Co., LLC)	CSR-8074-M
v.)	
CoxCom, Inc.)	
)	
Request for Carriage)	
)	

ORDER ON RECONSIDERATION

Adopted: February 11, 2009

Released: February 11, 2009

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Order on Reconsideration, the Bureau addresses the petition for reconsideration filed by KVMD Licensee Co., LLC ("KVMD or Station"), licensee of digital-only television station KVMD-DT, Twentynine Palms, California (CH. 23-Ind.) in response to the Bureau's decision (hereinafter "*Bureau Order*") in the above-captioned market modification proceeding (CSR-6252-A).¹ In the *Bureau Order*, we granted the petition for special relief of CoxCom, Inc. d/b/a Cox Communications Orange County ("Cox"), thereby removing certain California communities² ("LA communities" and

¹ *KVMD Licensee, LLC v. Cox Communications, Inc.*, 19 FCC Rcd 4509 (2004) ("*Bureau Order*").

² The Order granted the petition for special relief of Cox Communications, Inc. d/b/a Cox Communications Orange County and thereby removed the following communities from KVMD's market: Los Angeles County System - Los Angeles (San Pedro), L. A. County (unincorporated), Fort MacArthur AFB, Palos Verdes Estates, Rancho Palos Verdes, Rolling Hills Estates, and Rolling Hills, California; Orange County System - Aliso Viejo, Camp Pendleton, Coto De Caza, Dana Point, Dove Canyon, El Moro Beach, Marine Air Station (El Toro), Emerald Bay, Foothill (continued....)

“Orange County communities,” or collectively “modified communities”) from the designated market area (“DMA”) of KVMD. Because of this market modification, KVMD was determined not to be “local” to the cable communities for the purpose of cable television mandatory broadcast signal carriage rules and therefore, had no right to demand carriage on the Cox systems located in these communities. Accordingly, in our *Bureau Order* we also denied two must carry complaints filed by KVMD against Cox for carriage in the modified communities.³

2. KVMD initially filed a petition for reconsideration of Cox’s market modification, requesting that we reverse the *Bureau Order* with respect to the modified communities and require Cox to carry KVMD on its system within these communities.⁴ Cox filed an opposition to this petition to which KVMD replied. In addition, both parties filed numerous supplemental pleadings. KVMD subsequently filed a must carry complaint against Cox (CSR-6984-M) asserting its carriage rights in the event the Commission holds for KVMD in its petition for reconsideration of the modified communities for the 2008 election cycle (“2006 Complaint”).⁵ The Bureau granted this must carry complaint to the extent that it preserved for KVMD future must carry rights in the event that the Bureau’s Order was reversed.⁶ Cox subsequently filed a petition for reconsideration of the 2006 Complaint, and KVMD filed an opposition.⁷ Finally, KVMD recently filed a new must carry complaint against Cox (CSR-8074-M) involving the same communities as the previously-filed petitions. The issues in this complaint will be resolved by the instant order.

3. For the reasons explained below, we grant in part and deny in part KVMD’s petition for reconsideration of the market modification proceeding and thereby, affirm in part and reverse in part the *Bureau Order*. We also dismiss Cox’s petition for reconsideration regarding the 2006 must carry order (CSR-6984-M) and grant KVMD’s must carry complaint (CSR-8074-M).

II. BACKGROUND

4. Pursuant to Section 614 of the Communications Act⁸ and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* (“Must Carry Order”), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.⁹ A

(...continued from previous page)

Ranch, Foothill/Sonterra, Irvine, Laguna Beach, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo (including Aegean Hills), Modjeska Canyon, Newport Beach, Newport Coast, Orange, Rancho Cielo, Rancho Santa Margarita, San Clemente, San Juan Capistrano (including Capistrano Beach), Silverado Canyon, Trabuco Canyon, Tustin/Tustin Heights, and Marine Air Station (Tustin), California.

³ See *Bureau Order*, 19 FCC Rcd at 4518.

⁴ KVMD’s petition for reconsideration was filed on April 12, 2004.

⁵ KVMD’s must carry complaint, filed on January 13, 2006, appears to include all of the communities that were initially included in the two must carry complaints denied by the *Bureau Order* (CSR-6200-M and CSR-6242-M).

⁶ See *KVMD Licensee Co., LLC v. CoxCom, Inc., Request for Carriage*, 21 FCC Rcd 5902 (2006).

⁷ Both Cox and KVMD agreed to the consolidation of these petitions for reconsideration (the market modification order and the 2006 must carry order). See Response to Motion to Strike and Motion to Consolidate, at 1; Motion to Strike Supplement to Petition for Reconsideration and Motion to Consolidate, at 1.

⁸ 47 U.S.C. §534.

⁹ 8 FCC Rcd 2965, 2976-7 (1993).

station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.¹⁰ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns.¹¹

5. Section 614(h)(1)(C)¹² of the Communications Act authorizes the Commission to include or exclude particular communities from a television station's market for the purpose of ensuring that a television station is carried in the areas which it serves and which form its economic market. Section 614(h)(1)(C) specifically directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism and to consider several factors when determining whether a station's market should be modified for must carry purposes. These factors are:

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.¹³

In adopting rules to implement this provision, the Commission explained that these factors are not exclusive.¹⁴ The Commission also indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable to all stations in the market.¹⁵ Pursuant to *In Carriage of Digital Television Broadcast Signals First Report and Order* ("DTV Must Carry Report and Order"), the statutory factors in Section 614(h) and the evidence needed to support such petitions are applicable to digital television modification petitions during the transition. The Commission may

¹⁰ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. §76.55(e); *see Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

¹¹ Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included. For a more complete description of how counties are allocated, *see* Nielsen Media Research's Nielsen Station Index: Methodology Techniques and Data Interpretation.

¹² 47 U.S.C. §534(h) (1) (C).

¹³ *Id.*

¹⁴ *Must Carry Order*, 8 FCC Rcd at 2977 n.139.

¹⁵ *Id.*

consider changes in signal strength and technical coverage because of new digital television channel assignments and power limits when evaluating these statutory factors.

6. In the *Bureau Order*, the Bureau held that KVMD failed to show historical carriage, either as a digital or analog station;¹⁶ that KVMD failed to provide local programming of specific interest to the communities;¹⁷ and that under a Longley-Rice Predicted Contour analysis, KVMD's signal did not cover the Orange County communities or a majority of the Los Angeles County communities.¹⁸ Therefore, the Bureau granted Cox's petition for special relief and excluded KVMD from the above mentioned communities for the purpose of mandatory carriage.

III. DISCUSSION

7. We grant in part and deny in part KVMD's petition for reconsideration of the market modification proceeding, and dismiss Cox's petition for reconsideration regarding the 2006 must carry order. In its Petition for Reconsideration, KVMD argues that the Bureau erred in deleting KVMD from the subject communities. In support of this contention, KVMD asserts that the Bureau should have given more consideration to the station's carriage in nearby communities, local coverage, and local service.¹⁹ Thus, asserts KVMD, the Bureau must reverse the initial order excluding KVMD from the subject communities.²⁰ We will consider the arguments made by KVMD.

8. The historical carriage statutory factor requires consideration of "whether the station, or other stations located in the same area, have [sic] been historically carried on the cable system or systems within such community."²¹ In the *Bureau Order*, the Bureau held that there was no evidence of historical carriage of KVMD. KVMD does not dispute this conclusion.²² While not a statutorily defined factor like "historical carriage," the station's carriage on cable systems that overlap with or that are near to the subject communities may also demonstrate "a market nexus between the station and the communities where the station is carried," thus leading to an inference that the station's market includes the subject communities.²³ In the *Bureau Order*, however, the Bureau determined that KVMD's limited evidence of nearby carriage was "overwhelmed" because KVMD failed to show either local coverage or programming of local interest,²⁴ and thus, the weight of the evidence demonstrated a lack of local connection to the cable communities.

9. In its petition for reconsideration, KVMD contends that the Bureau should have given more weight to its carriage in nearby communities because the Station provides programming that is local

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Petition for Reconsideration at 2.

²⁰ See *id.* at 3.

²¹ 47 U.S.C. § 534(h)(1)(I).

²² See *Bureau Order*, 19 FCC Rcd. at 5252.

²³ See *Paxson Atlanta License, Inc.*, 13 FCC Rcd 20087, 20092 (1998).

²⁴ See *Bureau Order*, 19 FCC Rcd. at 5252 (citing *Avenue Cable TV, Inc.*, 18 FCC Rcd 23823 (2003)).

to the modified communities.²⁵ In opposition, Cox contends that KVMD's carriage by a few nearby cable systems is *de minimis*,²⁶ since KVMD has obtained carriage only on a "few isolated cable systems."²⁷ In Reply, KVMD contends its carriage on nearby systems demonstrates a local connection that should "dispel doubts" about KVMD's local coverage and programming.²⁸ We reject KVMD's arguments. Limited carriage in a few nearby communities cannot be used to "dispel doubts" concerning other statutory factors.²⁹ KVMD's limited carriage in nearby communities is not a strong enough foundation upon which to draw an inference that KVMD's "natural market" includes the cable communities.

10. KVMD also contends that it provides adequate coverage over the cable communities served by Cox's systems serving the modified communities (the Orange County communities and the Los Angeles communities). In the *Bureau Order*, the Bureau held that KVMD's coverage of the cable communities was inadequate.³⁰ At the time of our decision, KVMD was not operating at full power.³¹ The Bureau recognized, however, that KVMD's Longley-Rice Predicted Coverage at full power would provide adequate service to the Los Angeles communities.³² We take notice of the fact that KVMD is now operating at full power, and therefore, KVMD's Longley Rice predicted coverage area now extends to the Los Angeles system. Consequently, we find Cox's argument that KVMD's signal does not "actually reach" Log Angeles because of terrain barriers, or because of predicted co-channel interference from station KTBN-DT (Santa Ana) unpersuasive since Longley-Rice already accounts for these factors in its predicted coverage determinations. KVMD at full power, however, still fails under the Longley-Rice analysis to provide adequate coverage to the communities served by Cox's Orange County system. We also find unpersuasive KVMD's arguments that it compensates for inadequate coverage over Orange

²⁵ See Petition for Reconsideration at 3-4. KVMD was carried by Adelphia on the Redondo Beach system, adjacent to the Rancho Palos Verdes communities served by Cox's Los Angeles County system; and Newport Beach System, adjacent to the community of Irvine and the Laguna Beach communities served by Cox's Orange County system. See *Petition for Reconsideration* at 3. Comcast Corporation and Time Warner recently acquired the assets of Adelphia Communications Corporation. In the *Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner, Inc.; Transferee; Time Warner, Inc., Transferor, to Comcast Corporation, Transferee*, 21 FCC Rcd 8203 (2006).

²⁶ See Opposition at 5.

²⁷ See *id.*

²⁸ See Reply at 6.

²⁹ See e.g., *Time Warner Cable v. KHIZ (TV)*, 19 FCC Rcd 18618, 18621 (2004); *Avenue Cable TV*, 18 FCC Rcd 23823 (2003).

³⁰ See *Bureau Order*, 19 FCC Rcd. at 4517. The station's noise limited contour (predicted 41 dBu contour) shows coverage of the Orange County communities. In the *Bureau Order*, we noted that this difference is attributable to the fact that the Longley-Rice analysis considers topography. See *id.*

³¹ See *id.* The *Bureau Order* also emphasized that obstacles to KVMD's actual coverage included the station's transmission location and subsequent antenna angle discrimination. See *id.*

³² See *id.* The station's noise limited contour (predicted 41 dBu contour) did not show coverage. See *id.*

County by offering “unique local programming,” or that the Bureau should have given more weight to the station’s 41 dBu contour over Orange County communities.³³

11. KVMD’s final argument on reconsideration is that the Bureau failed to give due weight to the Station’s local programming when evaluating local service and other factors. The distinctive local programming that KVMD claims it is able to offer the modified communities includes sports coverage of events in and around the cable communities;³⁴ locally-produced multicultural programming;³⁵ local news coverage, and American One Network (AON) programming, including “Horse-TV” and “Working Wardrobe.”³⁶ In opposition, Cox argues that KVMD’s alleged local programming appeals to regional interests rather than local interests;³⁷ that its multicultural programming is directed at the interests of large ethnic groups rather than the specific interests of residents in the cable communities;³⁸ and that any local programming produced by KVMD is “occasional” and inadequate.³⁹ In reply, KVMD clarifies that its Spanish programming is locally produced and includes local coverage of topics such as “religion, business, sports, family values, and children’s programming.”⁴⁰ Because KVMD offers some specialized and local content, we hold that KVMD provides local programming to the cable communities.⁴¹

³³ See Petition for Reconsideration, at 4-5. The Commission expressly authorizes Longley-Rice propagation curves and presumes coverage as indicated on the curve. See 47 C.F.R. § 76.56(b)(2). In the *Second Report and Order on Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366, 8385 ¶ 44 (1999), the FCC encouraged a petitioner to provide a “more specific technical coverage showing, through the submission of service contour prediction maps that take terrain into account, particularly maps using the Longley-Rice prediction methodology.” *Id.* at 8388 ¶ 50.

³⁴ See Petition at 7. This coverage includes: (1) exclusive broadcast rights for three years to 10 regular-season basketball games involving Big West Conference teams, including university teams “located in the midst” of the modified communities or that are “otherwise in close proximity” to these communities; (2) High School Football Game of the Week involving schools in or near the cable communities; (3) minor league professional baseball; (4) horse equestrian shows filmed in Burbank and Delmar; (5) Big West Conference Women’s Soccer; (5) and minor league hockey coverage of teams in Long Beach, California. See *id.* at 7-8.

³⁵ This coverage includes Vietnamese-language programming and locally-produced Spanish-language programming broadcast from 12:00 am to 12:00 pm that includes “local coverage of a wide range of topics, including religion, business, sports, family values, and children’s programming.” See Petition at 8.

³⁶ See *id.* at 8.

³⁷ See Response at 9 (citing Petition on Reconsideration at 8). Cox defines the following KVMD programming as regional: AON’s “Horse-TV” and “Working Wardrobe”; high school football games; minor league hockey and basketball teams based in Long Beach, a single boxing match in Whittier, California, and an auto racing show originating in Perris, California. See *id.*

³⁸ *Id.* (citing *Cablevision of New Mexico, Inc.* 16 FCC Rcd 13959 (2001)).

³⁹ See *id.* at 11-12.

⁴⁰ See Reply at 5. (citing *Fouce Amusement Enterprises, Inc.* 10 FCC Rcd 668, 671 (1955)).

⁴¹ The station’s programming was the subject of numerous supplemental pleadings. KVMD filed supplemental pleadings on July 3 and July 30, 2004; Cox filed replies. In addition, on March 15, 2006, KVMD filed a supplement purportedly informing the Commission of recent changes affecting a Supplement filed on June 29, 2005. The June 29, 2005 supplement was not filed. Therefore, both parties requested that the March 15, 2006 supplement be dismissed. See Response to Motion to Strike and Motion to Consolidate at 2; Motion to Strike Supplement to Petition for Reconsideration and Motion to Consolidate at 2.

12. As discussed above, KVMD is now operating at full power and their signal provides coverage to Cox's Los Angeles system communities but not to the Orange County communities. In addition, because KVMD's signal has only recently improved, we believe that KVMD has not had sufficient time to demonstrate its audience appeal to cable and noncable households in the modified communities. This mitigates our prior findings regarding its limited viewership with respect to the Los Angeles communities. Moreover, KVMD has established that it provides some local content which is directed at the cable communities. Taken as a whole, we now believe that in light of KVMD's recent increase in coverage over Cox's Los Angeles cable system coupled with its programming that shows some local content, KVMD should be considered a local station on Cox's Los Angeles cable system. Based upon the above factors, we reverse our prior decision with respect to Cox's Los Angeles cable system.

13. Because we have reversed the *Bureau Order* with respect to the Los Angeles communities, we also will reconsider the must carry and retransmission rights of KVMD on this system. Section 76.64(f)(2) of the Commission's rules⁴² requires that all television stations make an election between must carry and retransmission consent every three years. KVMD did so by its September 26, 2005 letter to Cox. Subsequently, KVMD made a demand for carriage on Cox's cable system pursuant to Section 76.61(a)(1) of the Commission's rules⁴³ by letter dated November 7, 2005. Subsequent to the *Bureau Order* and after KVMD filed its petition for reconsideration, KVMD filed its 2006 Complaint with the Commission asserting carriage rights in the subject communities in the event that the Bureau, on reconsideration, determined that either the Los Angeles and/or Orange County communities were within KVMD's market. In response, the Bureau released a decision regarding the 2006 Complaint which held that in the event the Bureau's market modification order was reversed, Cox would be subject to must carry requirements with regard to carriage of KVMD.⁴⁴ Cox subsequently filed a petition for reconsideration of this must carry decision which we resolve below.

14. In light of our action today, we dismiss Cox's petition for reconsideration of our decision regarding KVMD's 2006 Complaint as moot. Contrary to Cox's contention, our decision in this matter merely preserved KVMD's right to assert carriage rights in the event that the cable communities were ultimately determined to be within KVMD's market. It did not, as Cox argued, grant any carriage rights to KVMD absent our decision today. Although KVMD made a demand for carriage on Cox's cable system pursuant to Section 76.61(a)(1) of the Commission's rules⁴⁵ by letter dated November 7, 2005, that demand related to the must carry election cycle that ended on December 31, 2008. However, in a subsequent must carry complaint (CSR-8074-M), KVMD made a similar demand for carriage relative to the election cycle that commenced on January 1, 2009. In view of this, we now require Cox to respond in writing to KVMD's latest request for carriage within 30 days of the release of this order and either commence carriage of the signal of KVMD on its Los Angeles cable system, or respond to the Commission with a statement of the reasons it has for believing that it is not obligated to carry such signal on the Los Angeles cable system. If Cox denies KVMD's request for carriage or channel position or if Cox fails to respond to KVMD's notice of intent to elect must carry within 30 days of the release of this

⁴² See 47 C. F. R. 76.64 (f) (2).

⁴³ See 47 C. F. R. 76.61 (a) (1).

⁴⁴ See *CoxCom, Inc. D/B/A Cox Communications Palos Verdes and Cox Communications Orange County*, 21 FCC Rcd 5902 (2006).

⁴⁵ See 47 C.F.R. 71.61(a) (1).

Order on Reconsideration, then KVMD must submit to the Commission a carriage complaint within sixty (60) days if it intends to pursue its carriage rights.⁴⁶

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. §534, and Section 76.59 of the Commission's rules, 47 C.F.R. §76.59, that the petition for reconsideration of Cox's market modification (CSR-6252-A) filed by KVMD Licensee Co., LLC **IS GRANTED IN PART AND DENIED IN PART** as discussed herein.

16. **IT IS FURTHER ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, , that the petition for reconsideration of KVMD's must carry complaint (CSR-6984-M) filed by CoxCom, Inc. d/b/a Cox Communications Orange County **IS DISMISSED AS MOOT**.

17. **IT IS FURTHER ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, that the must carry complaint filed by KVMD Licensee Co., LLC (CSR-8074-M) **IS GRANTED** and that Cox Communications Orange County shall commence carriage of KVMD within sixty (60) days of the date that KVMD provides a good quality signal to the cable system's principal headend. **IT IS FURTHER ORDERED**, pursuant to Section 614 (d) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, that CoxCom, Inc. d/b/a Cox Communications Orange County may present within **30 DAYS OF THE RELEASE OF THIS ORDER** any and all defenses to KVMD's petition for carriage on the Los Angeles cable system.

18. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

Monica Desai, Chief
Media Bureau

⁴⁶ See 47 C.F.R. 76.62 (a)(5).